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In the Supreme Court of the United States

OCTOBER TERM, 1982

MOBAY CHEMICAL CORPORATION AND
PENNWALT CORPORATION, PETITIONERS
v.
ANNE M. GORSUCH, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a statute that permits EPA to consider, in subsequent applications by other companies, health and safety data that were submitted to the government by petitioners in support of initial applications for pesticide registration, and that permits EPA to disclose such health and safety data to the public, constitutes an unconstitutional taking of petitioners' property requiring issuance of injunctive relief.

2. Whether the constitutionality of a statutory provision that requires arbitration between petitioners and an applicant for a pesticide registration who seeks to rely on petitioners' data, only if the parties fail to agree on the amount of compensation for the use of such data, is ripe for review, and, if so, whether the arbitration provision denies petitioners due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 682 F. 2d 419. The opinions of the district court for the Western District of Pennsylvania (Pet. App. A21-A101, A103-A107) are reported at 517 F. Supp. 252 and 254. The opinion of the district court for the Eastern District of Pennsylvania (Pet. App. A110-A121) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A19-A20) was entered on June 22, 1982. The petition for a writ of certiorari was filed on August 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1947, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), now codified at 7 U.S.C. (& Supp. IV) 136 *et seq.*, has required pesticide manufacturers to register their products before those products could be sold in interstate commerce. Before 1970, registrations were granted by the United States Department of Agriculture (USDA); and the Food and Drug Administration (FDA) was responsible for establishing tolerances for those pesticides that are applied to food and feed crops.[1] Since 1970 the Environmental Protection Agency (EPA) has performed both functions. 7 U.S.C. (& Supp. IV) 136a; 21 U.S.C. 346a.

The agency's decision whether to register a particular pesticide product depends upon its evaluation of the dangers that use of the pesticide poses to the environment, to fish and wildlife, and to members of the public who will be exposed to it directly and in their food and water. To carry out these regulatory responsibilities, EPA and its predecessors have required manufacturers to submit a variety of test data in support of applications for registrations and petitions for tolerances. These data define the risks and benefits of the products for which registration is sought and generally include data on the chemical nature and structure of the pesticide as well as test data concerning the dangers of the product ("health and safety data").[2]

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[1] A "tolerance" establishes the maximum permissible level of the pesticide product and its degradation products which cannot be exceeded in food. Pursuant to the Federal Food, Drug, and Cosmetic Act, a tolerance is set at the level required to protect the public from adverse health effects caused by pesticides. See 21 U.S.C. 346a(b).

[2] Health and safety data consist of the following major types of studies: (1) acute toxicity studies, which define how poisonous the pesticide is when ingested, inhaled, or applied to the skin or eyes; (2)

2. As originally enacted in 1947 (Act of June 25, 1947, ch. 125, 61 Stat. 163), FIFRA did not prohibit USDA from considering relevant data supplied to it by one applicant to determine whether to register the products of other companies. Because many of the pesticides for which registrations were sought were the same or substantially the same as previously registered products supported by data submitted to USDA (see S. Rep. No. 95-334, 95th Cong., 1st Sess. 7 (1977)), USDA was not obligated to, and did not, require the later applicant to duplicate the tests that USDA already had in its files. See *Amchem Products, Inc.* v. *GAF Corp.*, 391 F. Supp. 124, 127-128 & n.7 (N.D. Ga. 1975), remanded on other grounds, 529 F. 2d 1297 (5th Cir. 1976). The 1947 law also contained no prohibition against disclosure of data submitted in support of a registration (including health and safety data) but it did specifically prohibit disclosure of product formulas (7 U.S.C. (1970 ed.) 135a(c)(4) and 135f(c)).

FIFRA was substantially revised by the Federal Environmental Pesticide Control Act of 1972 (Pub. L. No. 92-516, 86 Stat. 973) ("1972 Amendments")). One of the more significant changes was the addition of a new Section 10, 7 U.S.C. (1970 ed., Supp. II) 136h, governing disclosure of data submitted in support of applications for registration. That section allowed applicants to identify portions of their data that they regarded as "trade secrets or commercial or

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chronic toxicity studies, which are used to determine if chronic exposure to the pesticide will have any long-term health effects such as causing cancer or birth defects; (3) residue studies, which define the level of the pesticide and its degradation products which remain in the food; (4) environmental chemistry studies, which are used to determine how much of the pesticide and its degradation products remain in the environment after application; and (5) fish and wildlife studies, which define how toxic the pesticide is to fish and wildlife that may be exposed to the pesticide after application in the environment.

financial information" (Section 10(a), 7 U.S.C. (1970 ed., Supp. II) 136h(a)), and it prohibited the EPA from publicly disclosing any "information which in [its] judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential" (Section 10(b), 7 U.S.C. (1970 ed., Supp. II) 136h(b)). The 1972 amendments did not, however, define the term "trade secrets."

In response to complaints from some sectors of the pesticide industry, Congress also added a new Section 3(c)(1)(D), 7 U.S.C. (1970 ed., Supp. II) 136a(c)(1)(D), under which, for the first time, EPA was prohibited from considering "trade secret" information submitted by one company in evaluating another company's application for registration without the permission of the data submitter.[3] While it could consider all other types of information without the permission of the data submitter, it could do so in a given case only if the applicant "offered to pay reasonable compensation [to the data submitter] for producing the test data to be relied upon" (*ibid.*). Congress amended Section 3(c)(1)(D) in 1975 to provide that the limitations imposed by that section were applicable only to data submitted on or after January 1, 1970. Act of Nov. 28, 1975, Pub. L. No. 94-140, 89 Stat. 751, 755 ("1975 Amendments").[4]

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[3]Section 3(c)(1)(D) as enacted in 1972 was added at the request of industry representatives, notably the National Agricultural Chemicals Association, a pesticide industry trade association. See *Federal Pesticide Control Act of 1971: Hearings on H.R. 25, H.R. 1077, H.R. 1722, et al., Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 331 (1971).

[4]Section 3(c)(1)(D), as amended in 1975, was challenged by Mobay Chemical Corporation in earlier proceedings on the ground that Section 3(c)(1)(D) caused an unconstitutional taking of Mobay's property rights in the data it had submitted prior to January 1, 1970. This claim was rejected by a three-judge court, which held that Section 3(c)(1)(D) did not "take" any of Mobay's property rights. *Mobay*

The extent of the Section 10 disclosure limitation and the Section 3(c)(1)(D) data-consideration limitation remained unclear in other respects, however, because Congress did not define the term "trade secret" in the Act. EPA took the view that, in the 1972 and 1975 Amendments, Congress had intended to give trade secret protection to only a narrow range of data—principally statements of formulas and manufacturing processes. EPA thus concluded that most health and safety data could be disclosed to the public and could be considered by EPA in evaluating subsequent registration applications without the permission of the data submitter. Data submitting firms successfully challenged this interpretation in the courts, obtaining decisions holding that the 1972 Congress had intended the "trade secret" prohibition to apply to any data, including health and safety data, that met the criteria specified in *Restatement of Torts* § 757 (1939). *E.g., Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024 (N.D. Cal. 1978); *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978). As a result of these decisions, the "trade secret" prohibition in Section 3(c)(1)(D) allowed data submitters to prevent any other firm from obtaining registrations for products that were the same or substantially the same as previously registered products unless the second firm duplicated the data supporting the first registration or unless it was determined, after perhaps years of litigation, that particular items of data were not trade secrets. In part because of such "trade secret" controversies, the process of registering new pesticides ground to a halt. See H.R. Rep. No. 95-663, 95th Cong., 1st Sess. 18 (1977); S. Rep. No. 95-334, 95th Cong., 1st Sess. 3 (1977).

Chemical Corp. v. *Costle*, 12 E.R.C. 1572 (W.D. Mo. 1978). Mobay's direct appeal to this Court under 28 U.S.C. 1253 was dismissed on the ground that the three-judge court had been improperly convened. 439 U.S. 320 (1979). No appeal was taken to the Eighth Circuit.

In 1978, Congress again amended FIFRA as part of the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 ("1978 Amendments"). It substantially changed Section 3(c)(1)(D) and Section 10 in order to cure the problems caused by the courts' interpretation of the term "trade secret." A new provision, Section 10(d), 7 U.S.C. (Supp. IV) 136h(d), was added, making certain health and safety data available for public disclosure; and the Section 3(c)(1)(D) prohibition on agency consideration of "trade secret" data contained in the 1972 amendments was abolished. Congress recognized that small potential competitors were discouraged from entering the market by the necessity of duplicating health and safety tests for products already established as safe by data that were contained in agency files but were rendered inaccessible by statute. See, *e.g.*, S. Rep. No. 95-334, 95th Cong., 1st Sess. 8, 30-31 (1977); see also 124 Cong. Rec. 29756-29758 (1978) (remarks of Sen. Leahy).

In place of the flat prohibition on agency consideration of "trade secret" data, Congress amended Section 3(c)(1)(D) to establish a comprehensive scheme governing EPA's consideration of test data submitted by earlier pesticide registrants. Thus, the Administrator may not consider, for a 10-year period after submission, data submitted in support of certain initial applications filed after the effective date of the 1978 amendments when reviewing an application for registration of a pesticide substantially like the one already registered, unless the Administrator has the written permission of the original data submitter (Section 3(c)(1)(D)(i), 7 U.S.C. (Supp. IV) 136a(c)(1)(D)(i)). Any other data, however, may be considered by the Administrator in connection with another company's application without the data submitter's permission; but if the data were submitted after December 31, 1969, the later applicant must offer compensation to the data submitter (this requirement to offer compensation applies only during the fifteen years

following submission of the data) (Section 3(c)(D)(ii), 7 U.S.C. (Supp. IV) 136a(c)(1)(D)(ii)). If the parties cannot agree on compensation, the amount is fixed by an arbitrator (*ibid.*). After the expiration of any exclusive-use and required-compensation periods, the Administrator may consider data in support of any application without either written permission or compensation arrangements (Section 3(c)(1)(D)(iii), 7 U.S.C. (Supp. IV) 136a(c)(1)(D)(iii)).

3. In its complaint in the United States District Court for the Western District of Pennsylvania, petitioner Mobay Chemical Corporation (Mobay) sought injunctive and declaratory relief from the operation of, *inter alia*, the data consideration and arbitration provisions of the 1978 amendments to Section 3(c)(1)(D), 7 U.S.C. (Supp. IV) 136a(c)(1)(D), and the disclosure provisions of Section 10(d), 7 U.S.C. (Supp. IV) 136h(d), as added by the 1978 amendments (Pet. App. A35-A36). Mobay alleged that the data consideration and disclosure provisions constituted a "taking" of its trade secret rights in test data submitted by the company to EPA. It contended that this "taking" was unconstitutional and should be enjoined because it was not for a public purpose, and because the company would not receive "just compensation" for the alleged taking. With respect to the arbitration provisions of Section 3(c)(1)(D)(ii), Mobay contended that the compulsory and binding arbitration scheme provided in that section violated the company's due process rights (*ibid.*).[5]

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[5]Mobay also challenged Section 3(g), 7 U.S.C. (Supp. IV) 136a(g), which requires the Administrator to re-register all pesticides "in the most expeditious manner practicable," alleging that this procedure "takes" rights Mobay obtained in its challenge to the pre-1978 amendment version of Section 3(c)(1)(D) (*Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811, 823-824 (W.D. Mo. 1978)). In that case, the district court had found that 23 registrations issued to other companies based upon Mobay's data had been illegally issued because they had not been

After a trial on the merits, the district court granted judgment in favor of EPA. With respect to the data consideration provisions of Section 3(c)(1)(D), the court followed the recent decision of the Third Circuit in *Chevron Chemical Co.* v. *Costle* ("*Chevron*"), 641 F. 2d 104, cert. denied, 452 U.S. 961 (1981), that this section does not cause a taking because a data submitter does not have a property interest in data submitted to EPA that affects the agency's right to use the information in considering other requests

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submitted to the Section 3(c)(1)(D) data-consideration restrictions. The court in the Western District of Missouri, however, did not declare these regulations invalid because Mobay would be compensated upon re-registration, which at that time was to occur by October 21, 1977. The 1978 amendments removed this deadline, and Mobay alleged in the Western District of Pennsylvania that this change is an uncompensated taking (Pet. App. A37).

Mobay also sought declaratory relief concerning the scope of a so-called "formulator's exemption" from the data submission and compensation provision of FIFRA, as provided in Section 3(c)(2)(D), 7 U.S.C. (Supp. IV) 136a(c)(2)(D) (Pet. App. A36). In addition, Mobay alleged that the agency had not yet promulgated adequate safeguards for release of information to government contractors and their employees under Section 10(e), 7 U.S.C. (Supp. IV) 136h(e), in violation of Mobay's due process rights (Pet. App. A36). Mobay argued that Section 10(g), 7 U.S.C. (Supp. IV) 136h(g), which precludes disclosure of information to foreign or multinational pesticide producers, deprived it of equal protection and that the agency had failed to implement procedures under Section 10(g) (Pet. App. A36).

Finally Mobay challenged EPA's "conditional registration" regulations and "data compensation regulations," 40 C.F.R. 162.7(d) and (e), 40 C.F.R. 162.9-4 and 162.9-5, promulgated by EPA to implement the 1978 amendments. Mobay alleged that these regulations were invalid because they were contrary to the statutory scheme embodied in the 1978 amendments and because EPA had failed to provide public notice and comment prior to promulgation (Pet. App. A36-A37).

None of these additional issues is raised in the petition for a writ of certiorari.

for registration (Pet. App. A38-A45). The court also followed the holding in *Chevron* that, because an applicant did not retain a property interest to preclude agency consideration of its data, the arbitration provisions of Section 3(c)(1)(D) did not violate due process (Pet. App. A45-A46). Finally, the district court held that the provisions for disclosure of health and safety data under Section 10(d) are within Congress' police power, and do not constitute a taking of Mobay's property (*id.* at A47-A51).[6]

b. Petitioner Pennwalt Corporation (Pennwalt) in its complaint in the United States District Court for the Eastern District of Pennsylvania raised similar challenges to Section 3(c)(1)(D) and Section 10. Pennwalt alleged that the data consideration and disclosure provisions of these sections deprived Pennwalt of its trade secret property

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[6]The district court rejected Mobay's other challenges as well. The district court held that Mobay's right to receive compensation under the judgment in *Mobay Chemical Corp.* v. *Costle*, *supra*, was not dependent on the occurrence of registration by a date certain, and dismissed Mobay's challenge to Section 3(g) (Pet. App. A97-A101). The court also upheld EPA's interpretation of the "formulator's exemption" under Section 3(c)(2)(D) (Pet. App. A83-A88). It found that certain interim procedures governing disclosure of information to government contractors under Section 10(e) were adequate to protect the confidentiality of Mobay's data (Pet. App. A52-A53). The court found that the distinction in Section 10(g) between foreign and multinational pesticide producers and other pesticide producers has a rational basis and therefore does not violate due process, and that EPA's interim procedures implementing Section 10(g) were adequate (Pet. App. A52-A59). Finally, the district court found that EPA's conditional registration and data compensation regulations were not arbitrary, capricious or unlawful (*id.* at A65-A89), and that there was good cause for the agency's failure to provide notice and comment prior to promulgation of these regulations.

rights in its data submitted to EPA, and sought declaratory and injunctive relief from the operation of these provisions (Pet. App. A111).[7]

The district court granted summary judgment in favor of EPA. As in the *Mobay* case, the court followed the Third Circuit's decision in *Chevron* that an applicant does not retain any property right in data submitted to EPA that would preclude EPA's consideration of that data in reviewing subsequent applications (Pet. App. A114-A116). The court also concluded that the disclosure to the public of health and safety data under Section 10(d) serves the legitimate public purpose of informing the public of pesticide hazards, and does not constitute a taking within the meaning of the Fifth Amendment (*id.* at A116-A118).[8]

4. In the consolidated appeals, the Third Circuit affirmed the judgments of the district courts as they related to Section 3(c)(1)(D) and Section 10. With respect to Section 3(c)(1)(D), the court followed its earlier ruling in *Chevron* that the consideration of data by EPA does not interfere with any property interest in that data retained by the data submitter (Pet. App. A7). Similarly, the court followed the *Chevron* ruling that because there is no property interest that would bar the government's use of submitted data, the compulsory arbitration provision of Section 3(c)(1)(D) does not deprive a data submitter of any due process rights

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[7]Pennwalt also alleged that the agency had failed to promulgate regulations to enforce the prohibition in Section 10(g) against disclosure of information to foreign or multinational pesticide producers. Pennwalt, however, did not challenge the arbitration provision of Section 3(c)(1)(D) nor any of the other statutory or regulatory provisions objected to by Mobay.

[8]The district court also found adequate EPA's interim procedures promulgated pursuant to Section 10(g), which precludes disclosure of any of the registration data in EPA's files to representatives of foreign or multinational pesticide companies.

(*ibid.*). The court also found that the reasoning of *Chevron* applied to the data disclosure provisions of Section 10: disclosure by the government of data voluntarily submitted in exchange for a commercially valuable pesticide registration does not constitute a taking. It stressed that the limited disclosure of health and safety data (but not of data relating to manufacturing processes or the confidential statement of the formula of the product) served the important purpose of informing the public of possible significant hazards presented by pesticides. The court concluded that in enacting Section 10, Congress balanced the desire of pesticide manufacturers to keep confidential their data against the public interest in protecting the health of the community, and acted well within its constitutional power[9] (Pet. App. A7-A9).

ARGUMENT

The court below fully considered and correctly rejected petitioners' contentions. The Third Circuit opinion does not conflict with decisions of this Court or of any court of appeals. Accordingly, further review is unwarranted.

1. Petitioners contend that when they submit data to EPA in exchange for a valuable pesticide registration they retain a property interest in the data, and, further, that this property interest precludes EPA from considering that data in its review of other applications as well as from disclosing health and safety data to the public (Pet. 9-15). This argument is without merit.

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[9]The court also found no good cause for EPA's failure to provide notice and comment prior to promulgation of its data compensation and consideration regulations (Pet. App. A15-A17). In order not to halt EPA's pesticide registration program, however, the court did not immediately invalidate the regulations, but has delayed issuance of its mandate in this regard for a period of six months to enable the agency to promulgate regulations with appropriate procedures (*id.* at A17-A18).

The government does not dispute that some of the data submitted to EPA by a pesticide producer may contain trade secrets protected by state law, and that, prior to submission of this data to EPA in connection with a pesticide registration application, the data submitter possessed the right to exclude others from the use and enjoyment of these trade secrets. State law, however, does not govern this case. Rather, the question presented is whether any state law by itself creates, or may create, a property right that precludes Congress from lawfully directing a federal agency to make internal use of information submitted to it or to disclose to the public health and safety data relevant to the potential risks and hazards posed by pesticides. Petitioners have cited no decisions of this Court or of any court of appeals confirming the existence of such a state-created right. Moreover, if such rights protected by state trade secret law were found to exist, Congress clearly could alter those rights as part of a federal regulatory scheme. In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), the Court held that federal patent law had not preempted the state law of trade secrets at issue there, but did not suggest that there is a constitutional impediment to such preemption. Cf. *New England Power Co.* v. *New Hampshire*, No. 80-1208 (Feb. 24, 1982); *Fidelity Federal Savings & Loan Association* v. *De La Cuesta*, No. 81-750 (June 28, 1982).

Federal law has, at times, sought to protect a data submitter's trade secrets from further agency use and disclosure. See 1972 Amendments to Sections 3(c)(1)(D) and 10 of FIFRA, as interpreted by *Chevron Chemical Co.* v. *Costle, supra*, and *Mobay Chemical Corp.* v. *Costle, supra*. The restrictions embodied in these earlier sections or in regulations, however, were matters of federal statutory or regulatory law, and neither imposed any continuing obligations on the government nor conferred any rights of constitutional stature on the data submitter. See *Chevron Chemical Co.* v. *Costle, supra*, 641 F. 2d at 107-114, 115.

In any event, even assuming that petitioners continue to possess some property right in data submitted to the agency in connection with a commercially valuable pesticide registration, petitioners have not shown that a taking occurs by virtue of the limited interference with that right occasioned by the agency's internal consideration and restricted disclosure of the data to achieve the public purposes defined in the statute. Section 3(c)(1)(D) was enacted to foster competition in the pesticide industry by eliminating the anticompetitive effects of the earlier versions of FIFRA which, in practice, acted as a de facto extension of the life of patents beyond the statutory period of patent protection (see pages 5-6, *supra*).[10] This statutory scheme is a reasonable one for which the principles of "justice and fairness" embodied in the Fifth Amendment do not require compensation. See *Agins* v. *City of Tiburon*, 447 U.S. 255, 262-266 (1980); *Andrus* v. *Allard*, 444 U.S. 51 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978); *Petrolite Corp.* v. *EPA*, 519 F. Supp. 966, 972 (D.D.C. 1981) (any interference with a pesticide producer's rights caused by the limited operation of Section 3(c)(1)(D) falls far short of being a taking).

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[10]Petitioners argue that Section 3(c)(1)(D) cannot be upheld as a means of promoting competition because "the use of one's property can[not] simply be taken by the Government and given to his competitors under the guise of fostering competition" (Pet. 15). Their argument wrongly implies that Section 3(c)(1)(D) causes data to be taken from petitioners and given to their competitors. To the contrary, the data remain in the agency's files, and never are given or shown to the subsequent registrant. Section 3(c)(1)(D) is merely a device for streamlining the registration process and for lowering governmentally-created barriers to entry in the pesticide industry. The barriers are designed to assure the safety of a given pesticide, and may be lowered once that safety has been demonstrated.

Similarly, as the court of appeals recognized (Pet. App. A8-A9), the primary purpose of Section 10's disclosure provision is to provide the public with important health and safety information concerning the frequently hazardous pesticides to which it may be exposed.[11] Courts consistently have upheld similar schemes providing for release to the public of commercially valuable information to further a legitimate public purpose. See *National Fertilizer Association* v. *Bradley*, 301 U.S. 178 (1937); *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427 (1919);[12] *Westinghouse Electric Corp.* v. *United States Nuclear Regulatory Commission*, 555 F. 2d 82, 95 (3d Cir. 1977); *Petrolite*

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[11]Petitioners allege that the pesticide label provides the public with adequate health and safety data (Pet. 17-18). The government contended below, however, that the underlying data contain important information not addressed on the label. More importantly, petitioners' argument totally ignores the fact that the determination of what information should be disclosed to the public lies with Congress and not with the pesticide industry.

Petitioners' contention that Section 10 results in an impermissible "shared regulation of pesticides" (Pet. 18) similarly is without foundation. Section 10 merely provides the public with information to make more informed choices and to comment more knowledgeably on EPA's regulatory actions. This Court consistently has recognized the propriety, and indeed the desirability, of obtaining public input into the regulatory process by making the information upon which regulatory decisions are based available to the public. See, *e.g.*, *FCC* v. *Schreiber*, 381 U.S. 279 (1965); *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U.S. 56, 60-62 (1939).

[12]Petitioners question the court of appeals' reliance on the *National Fertilizer* and *Corn Products* cases, apparently because the "sophisticated and complex scientific research * * * would be wholly unintelligible to any such consumer" (Pet. 17 n.12). Petitioners completely ignore that many groups, such as farmworkers, chemical workers' unions and environmental organizations, which have a keen interest in this data, can retain scientists who are fully qualified to review the health and safety data.

Corp. v. *EPA, supra*, 519 F. Supp. at 972-973 (disclosure under Section 10 does not constitute a taking, relying on *Andrus* v. *Allard, supra*).[13]

Finally, even if either of these sections caused a taking of petitioners' property, they should not be declared unconstitutional nor their effectiveness enjoined. A taking will be enjoined as unconstitutional only if it has not been duly authorized, if it is solely for the benefit of other private persons and serves no public purpose, or if the owner will be denied just compensation for the property taken. See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 & n.16 (1974). Here, there is no dispute that the use and disclosure of data are duly authorized by Sections 3(c)(1)(D) and 10. As shown above, both sections serve important public purposes. Petitioners may seek any "just compensation" to which they may be entitled through negotiation, arbitration, or in the Court of Claims under the Tucker Act, 28 U.S.C. 1491. See *Duke Power Co., supra*; *Regional Rail Reorganization Act Cases, supra*; *Union Carbide Agricultural Products* v. *Costle*, 632 F. 2d 1014, 1019 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981).[14]

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[13]The district court in *Pennwalt* also found that any interference with the company's property interests occasioned by Section 10 "is not so great as to constitute a taking within the meaning of the Fifth Amendment" (Pet. App. A118).

[14]Insofar as petitioners contend that this Court's decision in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), requires that Section 3(c)(1)(D) and 10 be declared void to the extent that they cause a taking (Pet. 18-19), petitioners are in error. Although the availability of a Tucker Act remedy was not discussed in that case, to the extent the result reached there is inconsistent with the *Rail Act Cases*, it effectively has been overruled. See *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 179 (dissent of Justice Douglas discussing inconsistency with *Louisville* case).

2. Petitioners also challenge as unconstitutional the arbitration scheme set forth in Section 3(c)(1)(D)(ii), alleging that it deprives them of due process of law. Their arguments are premature and, in any event, insubstantial.

As a preliminary matter, petitioners' claims are not ripe for review. Under Section 3(c)(1)(D)(ii), the "terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant * * *." Arbitration is only required in the event that the parties do not reach such an agreement. *Ibid.* In the analogous case of *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 305 (1979), involving a challenge to a compulsory arbitration provision contained in a state statute, this Court held that so long as it was possible that future labor disputes might be resolved by negotiation, thus avoiding the situation where arbitration would become compulsory, no case or controversy was presented because "any ruling on the compulsory arbitration provision would be wholly advisory." Similarly, petitioners here have not been required to take part in any compulsory arbitration. For this reason alone, review of the arbitration scheme should be denied.

In any event, petitioners err on the merits of their claim. First, as recognized by the court of appeals (Pet. App. A7), if petitioners retain no property interest in their data that would interfere with the agency's consideration under Section 3(c)(1)(D), then they have no claim that they are deprived of due process by the arbitration scheme.

Moreover, this Court consistently has upheld as constitutional a variety of statutes that provide for mandatory arbitration of disputes. See *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972); *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966); *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden*, 284 U.S. 151 (1931). See

also *Country-Wide Insurance Co.* v. *Harnett*, 426 F. Supp. 1030 (S.D. N.Y. 1977) (three-judge court), aff'd without opinion, 431 U.S. 934 (1977).[15]

Finally, Section 3(c)(1)(D)(ii) is not unconstitutional as petitioners contend because it limits judicial review of the arbitrator's decisions to "fraud, misrepresentation, or other misconduct," (Pet. 22). This Court has upheld a state statute containing a similar limitation on judicial review of arbitration awards, finding "ample protection for the fundamental rights" of the parties. *Crane* v. *Hahlo*, 258 U.S. 142 (1922). See also *Sill* v. *Pennsylvania State University*, 462 F. 2d 463, 469 (3d Cir. 1972); *Ludwig Honold Manufacturing Co.* v. *Fletcher*, 405 F. 2d 1123, 1127 (3d Cir. 1969); *Edwards* v. *St. Louis-San Francisco R.R.*, 361 F. 2d 946 (7th Cir. 1966).

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[15]The cases cited by petitioners do not support their argument that the arbitration scheme deprives them of their property and liberty of contract without due process of law. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) (see Pet. 21), do not purport to deal with statutes requiring noncontractual arbitration or, indeed, with the constitutionality of any statute. Rather, those decisions involve the interpretation of contracts to determine whether the parties had agreed to arbitrate particular issues. Two other cases relied on by petitioners, *Dorchy* v. *Kansas*, 264 U.S. 286, 289 (1924), and *Wolff Co.* v. *Industrial Court*, 262 U.S. 522 (1923) (see Pet. 2), are concerned more with the propriety of regulation than with arbitration. Those decisions depended entirely on "liberty of contract" notions of substantive due process that are now outmoded and discredited, see, *e.g.*, *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535-537 (1949), and their fundamental premise, that certain industries cannot be said to be "clothed in the public interest," was rejected by this Court in *Nebbia* v. *New York*, 291 U.S. 502 (1934). Moreover, a recent challenge to a state compulsory arbitration statute, based on *Dorchy* and *Wolff*, was squarely rejected in *Country-Wide Insurance Co.* v. *Harnett*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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